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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 489.

PITTSBURGH PLATE GLASS COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioner prays that this Court grant rehearing of its decision of June 22, 1959 in the above-entitled case.

Argument.

The opinion of this Court disposed of two cases together—that of the present petitioner Pittsburgh Plate Glass Company, No. 489, and that of Galax Mirror Company, Inc., *et al.*, No. 491. The copetitioners with Galax were Mount Airy Mirror Company and J. A. Messer, Sr., who was chairman of the board of both Galax and Mount Airy. We respectfully submit that the reasons stated for the decision are applicable only to the Galax petitioners and are not applicable to Pittsburgh Plate Glass Company, whose con-

nection with the conspiracy to fix mirror prices, unlike that of Galax, depended wholly upon the testimony of the single witness, A. G. Jonas. The question before this Court in No. 489 is whether denial of access to the grand jury testimony of this witness was under the circumstances of the case reversible error as to Pittsburgh Plate Glass Company ("PPG").

The following statements in the opinion, among others, are inapplicable to PPG:

"It is sufficient to say that the Government proved its case through 10 witnesses, the last of whom was A. G. Jonas" (p. 2).

"The Government admits that he was an 'important' witness. However, proof of the conspiracy was overwhelming aside from Jonas' testimony" (p. 3).

"As we read the record the petitioners failed to show any need whatever for the testimony of the witness Jonas" (p. 6).

These statements can be explained only on the basis that this Court, understandably in view of the 860 page record to which the Court refers (page 2), commingled the facts relevant to PPG with those relevant to the Galax petitioners.

The opinion of the Court states that the Government "proved its case" through 10 witnesses.* This figure has no significance as to PPG. Of the 10, there were 3 routine witnesses** concerned with identification of documents or matters of general information as to defendants other than

* In point of fact the Government called more than the 10 witnesses listed on pages ii and iii of the index to the record—e.g., R. 791, 792—but the additional witnesses gave routine testimony in no way relating to PPG.

** E. H. Mayes, R. J. Helms and Novice Baum.

PPG. Of the 7 remaining, 3 more* were similar routine witnesses whose testimony related to PPG, but not in the context of conspiracy. There were only 4 witnesses as to the conspiracy: Ralph G. Buchan, sales manager for Carolina Mirror Corporation, a defendant company; Robert Stroupe, vice president of Stroupe Mirror Company, a defendant company; Grady V. Stroupe, president of Stroupe Mirror Company; and A. G. Jonas, president of Lenoir Mirror Company, not a defendant company.

But there were not 4 witnesses against PPG. The testimony of Buchan and the two Stroupes was undoubtedly ample to establish a conspiracy to fix mirror prices as to the Galax petitioners, but it established precisely nothing as to PPG.

Buchan's testimony was as follows: At the annual meeting of the Mirror Manufacturers Association in Asheville, North Carolina, he was present when Kenneth Hearn of Virginia Mirror Company, a defendant company, called Jonas in Lenoir, North Carolina, and told him that J. A. Messer, Sr., chairman of the board of the Galax companies, wanted to raise prices. Jonas replied that he would not believe Messer at any time. (R. 178-83). On the following day Buchan met with Messer, Jonas, Grady Stroupe and Messer's young grandson at an inn called "The Bluffs" (R. 187-91). At that meeting "Messer said that we all had to raise our prices and to get out a letter on the same day" (R. 196). Jonas said "that John [Messer] was calling the shots" (R. 197), and it was said, that the price of 78 percent off list would be just right (R. 198). *With respect to PPG*, Buchan testified only that he could not recall discussing prices with W. A. Gordon, PPG's manager of plate glass sales (R. 174-5), who was at the Asheville convention,

* H. P. Barrett, Minita Westcott and D. F. Arden.

PPG being a supplier of plate glass to the mirror industry (R. 849).

Robert Stroupe corroborated Buchan as to the events at Asheville. He testified that J. A. Messer, Sr. came to a table where he and Hearn were dining and "said that it was his plan to send out a letter announcing a price change to 78" (R. 213). Later Stroupe was in Hearn's room when Hearn called Jonas and told him of Messer's statement, to which Jonas' reaction was very cold (R. 217-9). *With respect to PPG*, Stroupe testified that Jonas asked to have Gordon call him (R. 219) and that 20 or 30 minutes later Stroupe saw Gordon and related the conversation with Jonas, at which time Gordon had already talked to Jonas (R. 222-3). In addition, Stroupe told of two completely trivial conversations at Asheville, one with Gordon (R. 219-20) and one with his assistant Ketchum (R. 221-2).

Grady V. Stroupe corroborated Buchan on the meeting at The Bluffs. He testified that he met there with Jonas, Messer, Buchan and Messer's grandson. Messer said that he was going to send out a letter lowering the discount to 78. "We were told by Mr. Messer that it had to be 78" and "Mr. Messer said that if he sent out a letter we would all have to send out a letter" (R. 227). Jonas said "that Mr. Messer was calling the rules of the game and we would have to play by them" (R. 228). *With respect to PPG*, Grady Stroupe said not one word.

This was the whole of the testimony as to the conspiracy at the time the Government called A. G. Jonas. While it may have been "overwhelming proof" of a conspiracy as to Galax, Mount Airy and Messer, obviously it was wholly without force as to PPG. There were not 10 witnesses against PPG, nor 4 witnesses—there was only Jonas. So far as Robert Stroupe's testimony about the telephone conversation between Gordon in Asheville and Jonas in Lenoir is concerned, it is sufficient to note that Gordon was

acquitted at the close of the Government's case (R. 301-2). Gordon was a plate glass sales representative whose duties bore no relation to the pricing of mirrors. But, in any event, according to *any* of the evidence, no agreement was reached at Asheville. Otherwise there would have been no purpose for the meeting at The Bluffs on the following day.

The only other evidence as to PPG at the time Jonas was called by the Government was an announcement of a price increase to 78 percent sent out on November 1, 1954 by the PPG warehouse at High Point, North Carolina (R. 58-9). This announcement came three days after October 29, 1954, the date fixed by Messer at The Bluffs for the conspiratorial announcements to be sent. Obviously knowledge of this conspiracy was a prerequisite to participation.* The mere sending of the High Point price announcement by itself proved nothing. In order to prove participation in the conspiracy the Government had to bridge this vital gap—it had to establish that PPG *knew* of the meeting at The Bluffs and the agreement reached there.

To bridge this gap the Government had only the testimony of Jonas. His account of the meeting at The Bluffs was substantially like that of Buchan and Grady Stroupe (R. 241-5), although only Jonas testified squarely that an agreement was reached. However, he went on to give testimony crucial as to PPG. He said that he told those at The Bluffs that he would report the outcome to PPG (R. 247). (Neither Buchan nor Stroupe had testified to such a statement.) He said that he called Pittsburgh the following day, October 29, 1954, and talked to Sam J. Prichard, an assistant of Gordon's, and "told him about our gathering up on The Bluffs and what we agreed on the price and asked him if he would convey my remarks to Mr. Gordon". On November 1, 1954 he called Prichard again, gave him a pur-

* The "vital issue of knowledge" in a conspiracy case was recently emphasized by this Court in *Ingram v. United States*, 27 U. S. L. Week 4489, 4491 (June 29, 1959).

chase order and asked if anything had been done relative to the previous conversation. Prichard said it had been reported, and Jonas "felt the matter would be taken care of" (R. 249).

This last testimony by Jonas was wholly uncorroborated. More than that, it was flatly contradicted by Prichard who took the stand as the first witness for the defense (R. 303-6, 850). Yet this was the only testimony or evidence of any sort which bridged the gap between the conspiracy at The Bluffs and the PPG High Point warehouse price announcement of November 1, 1954, three days after the conspiratorial date. Without that testimony PPG's conviction was necessarily based upon a theory of conscious parallelism; but the Court of Appeals ruled that this was not the basis of the conviction (R. 851). The basis, therefore, was this uncorroborated, contradicted testimony by Jonas, a self-confessed co-conspirator.*

If this Court had desired to adopt the rule that the prosecution is entitled to the exclusive use of grand jury testimony as a tactical weapon in the trial of a criminal case, it would presumably have said so, and we should not have filed this petition for rehearing. This Court did not do so; it reasserted the principle that grand jury testimony should be made available to the defense "when the ends

* Jonas' testimony about his calls to Prichard shows most dramatically PPG's particularized need for his grand jury testimony. However, he was also the only witness who tied PPG to the events at Asheville in any significant fashion. He testified that when he received Hearn's telephone call he "wasn't sure whether the boys were trying to pull something on me or not" (R. 237). So he asked to have Gordon call him. He felt that Gordon as a very close personal friend would tell him if there was any truth in the matter. Gordon called and told him he had heard talk of raising prices (R. 238). He didn't try to tell Jonas what he should or should not do. He might have said "you ought to be getting more for the product than we were getting for" (R. 239). Jonas then told Gordon to have Hearn call him again (R. 239).

of justice require it" upon a showing of "a particularized need." But if these words mean anything, they are applicable to the case of PPG in relation to the testimony of the witness Jonas.

No one can examine this record of a conviction on the basis of the testimony of a single witness, the most vital part of whose testimony was uncorroborated and contradicted, without acknowledging that there is a substantial possibility that if PPG had had access to the grand jury testimony of that witness for use in impeachment there would have been an acquittal, not a conviction. This being so, we submit that a particularized need existed and that the ends of justice required disclosure.

By commingling the cases of PPG and Galax this Court has made an erroneous statement of material fact in its opinion. As the record shows, it is not true as to PPG that "proof of the conspiracy was overwhelming aside from Jonas' testimony." In simple justice this Court should not permit this error to stand.

Moreover, it is obvious that careful practitioners will smoke out the error in future analysis of the case and, having done that, will show that if a particularized need did not exist here for PPG, then it can never exist. Therefore this case will stand indeed as "lip service" to the doctrine of particularized need unless justice is to be done not in this case but in some future case.

Conclusion.

The petition for rehearing should be granted, and upon rehearing the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Certificate.

It is hereby certified that the foregoing petition for rehearing is presented in good faith and not for delay.

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